STATE OF MICHIGAN

IN THE SUPREME COURT

MARK P. JAMES,

Plaintiff-Appellee,

and

AUTO-OWNERS INSURANCE COMPANY,

Intervening Plaintiff-Appellee,

vs

AUTO LAB DIAGNOSTICS & TUNE UP CENTERS and FARMERS INSURANCE EXCHANGE,

Defendants-Appellants,

and

SECOND INJURY FUND (PERMANENT & TOTAL PROVISIONS),

Defendant-Appellee.

/

Supreme Court No. 128355

Court of Appeals No. 257993

WCAC No. 04-0002

128355

ANSWER OF INTERVENING PLAINTIFF-APPELLEE, AUTO-OWNERS INSURANCE COMPANY, TO AUTO LAB/FARMERS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT REGARDING JURISDICTION

Intervening Plaintiff-Appellee, AUTO-OWNERS INSURANCE COMPANY, accepts Defendants-Appellants' statement regarding the jurisdictional basis in this matter as accurate.

COUNTER-STATEMENT OF QUESTION PRESENTED

I. SHOULD THE COURT DENY THE APPLICATION FOR LEAVE TO APPEAL WHERE, CONTRARY TO DEFENDANTS-APPELLANTS' INTERPRETATION OF *CAMBURN*, THE WCAC PROPERLY WEIGHED THE FACT THAT AUTO LAB WOULD DIRECTLY BENEFIT FROM PLAINTIFF'S PARTICIPATION IN THE SEMINAR WITH OTHER FACTORS AND THUS AFFIRMED THE SUPPORTED FINDING THAT THE INJURY WAS AN INCIDENT OF PLAINTIFF'S EMPLOYMENT?

Defendants-Appellants AUTO LAB/FARMERS answer, "No."

Plaintiff-Appellee JAMES would answer, "Yes."

Int. Plaintiff-Appellee AUTO-OWNERS answers, "Yes."

II. SHOULD LEAVE TO APPEAL BE DENIED ON DEFENDANTS' ATTORNEY FEE QUESTIONS WHERE THEY ARE NOT PRESERVED OR WERE OTHERWISE DECIDED PROPERLY BELOW?

Defendants-Appellants AUTO LAB/FARMERS would answer, "No."

Plaintiff-Appellee JAMES would answer, "Yes."

Int. Plaintiff-Appellee AUTO-OWNERS answers, "Yes."

COUNTER-STATEMENT OF FACTS

The application for leave to appeal, filed in this matter by Defendants-Appellants, AUTO LAB DIAGNOSTICS & TUNE UP CENTERS ("AUTO LAB") and its workers' compensation insurer, FARMERS INSURANCE EXCHANGE, follows the Court of Appeals' denial of Defendants' application for leave to appeal from an open award of workers' compensation benefits. The award of benefits was based on permanently disabling injuries Plaintiff MARK JAMES suffered in a motor vehicle accident while traveling with his fellow employee to a work-related seminar on October 24, 2001. The principal issue raised is whether the injuries Plaintiff sustained arose out of and in the course of his employment with Defendant AUTO LAB.

Based on a sufficiently strong nexus shown to exist between Plaintiff's employment and the injury such as to make the injury a circumstance of employment, Magistrate Kenneth L. Block found the injury to be compensable under the workers' disability compensation act (Mag. Opinion, 12/18/03, p. 3) (copy attached to Defendant's application for leave to appeal). AUTO LAB and its insurer, FARMERS INSURANCE EXCHANGE, appealed the decision to the Workers' Compensation Appellate Commission, which considered not only the principal issue of work-relatedness but questions concerning the magistrate's award of attorney fees, as well.

Examining the potential impact of this Court's decision in *Camburn v Northwest School District*, 459 Mich 471; 592 NW2d 46 (1999), the Appellate Commission affirmed the magistrate's finding that Plaintiff's injuries did indeed arise out of and in the course of

his employment, "impressed by the fact that *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444[; 320 NW2d 858] (1982) remains a viable decision, making this case compensable." (WCAC Opinion, 8/20/04, p. 9) (copy attached to Defendant's application for leave to appeal). The Appellate Commission also upheld, in part, and reversed, in part, the magistrate's assessment of attorney fees against Defendants. (*Id.*, p. 10). The case was ordered remanded to the magistrate for further proceedings on the issue of "attendant care" (*id.*, 11).

From the decision rendered by the Appellate Commission, Defendants filed an application for leave to appeal to the Michigan Court of Appeals on September 20, 2004. The application was denied, "for lack of merit in the grounds presented," by order of February 22, 2005. Defendants timely filed their application for review in this Court raising the same arguments they asserted in their Court of Appeals application.

The material facts pertaining to the fundamental issue of work-relatedness are as follows. Plaintiff JAMES, graduate of a two-year college course in automotive and diesel technology at the UTI Institute in Chicago, Illinois (Tr I 9),[1] was 28 years old at the time of the subject accident. He had worked as an auto mechanic most of his adult life and holds certifications in the areas of engine repair, air conditioning and brakes (Tr I 9). Although Plaintiff only had worked for Defendant AUTO LAB approximately two months by the time

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[1] There were four separate trial hearing dates below. References to the transcripts thereof will be as follows: "I" refers to the hearing date of May 19, 2003; "II" to the hearing date of June 6, 2003, "III" to June 16, 2003, and "IV" to October 22, 2003. Additionally, "B" refers to the deposition of witness Brian Booher, which was admitted as evidence during the trial (I 7; Mag. Opinion, p. 2).

of the accident (Tr I 10, 50) and was still in his 90 day probationary period, already he had shown himself to be an excellent employee and a "very capable technician" (Tr II 36, 46-47).

Defendant AUTO LAB is an incorporated franchise providing general automobile repair services, including wheel alignments, brakes, exhaust, oil changes, transmission service, engine replacement, head gasket work, tires and other services (Tr I 19-20). On a day prior to October 24, 2001, the principal owner of AUTO LAB, Randy Gable, approached Plaintiff and offered to pay his way, along with his fellow technician, Brian Booher, to attend an auto-repair training seminar on the OBD-II system (on board diagnostics, second generation) (Tr I 18, 33, 45). The eight hour seminar would run over the course of two evenings, four hours each night (Tr I 21-22, 87), and was being presented in Grand Rapids, Michigan -- a two-hour drive one-way from Coldwater (B 27-28).

Booher and JAMES gladly accepted the opportunity. The plan was to work at the shop most of the day on Wednesday, October 24, 2001, make the drive from Coldwater to Grand Rapids in time for the 6:00 or 6:30 p.m. beginning of the seminar, then make the return trip from Grand Rapids that same night and repeat the process on Thursday, October 25, 2001 (Tr I 23-24, 29-30, 112-113). Randy Gable, Defendant's principal owner, conceded that the two employees were allowed to leave the shop a couple hours early to travel to the seminar -- without any decrease in the hours they would be credited for working

that week[2] -- since, after all, their attendance at this seminar provided the company with an admitted "benefit" and served a "business purpose" (Tr II 69-70, 72, 76).

The other part-owner of the Defendant company, Timmy Hammock (Tr I 88), likewise conceded that JAMES and Booher's attendance at the seminar was "important enough" to the company to suffer the financial detriment that would flow from the loss of their productivity for two hours each day (Tr I 109-111). Further, while initially there was some conflict in the testimony regarding Defendant's offer to cover all the expenses relating to the seminar, the Magistrate ultimately made a supported finding of fact that the food, gas and seminar costs would be covered by Defendant (Tr I 23; Tr II 7, 14; B 21-22, 44-45), as employees of the company previously and indeed routinely were reimbursed their expenses for attending such technician seminars (Tr I 101; Tr II 38-39) (*see*, Mag. Opinion, pp. 3-4).

Although Plaintiff was not yet state certified in engine tune-up/performance (required for diagnostics work) (Tr II 30-31), Plaintiff had been trained in his college curriculum and in previous seminars to use the on-board computerized diagnostic systems known as OBD-I

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[2] It was finally established as fact, and is now conclusive, that both Booher and JAMES effectively were "on the clock" during their travel to the Grand Rapids seminar. Their regular work day went from 8:00 a.m. to 6:00 p.m. (less an hour off for lunch) (Tr I 14, 45). And while the two were not paid strictly by the hour in terms of "punching in" and "out" everyday, they only earned their guaranteed 30 hours of pay each week if they worked full days every day. If they failed to "flag" at least 30 billable hours in the week, any shortage in their full 8:00-6:00 work day would reduce their pay for that week -- but Defendant's principal admitted that, in this instance, Plaintiff's and Booher's driving time to the seminar *would* count toward their minimum hours of work to receive their full weekly pay (Tr II 72, 101-102). The magistrate thus found as a supported fact that Plaintiff, at the time of the accident, was effectively still being paid for those hours of the work day (Mag. Opinion, p. 4). Defendants' statement, then, that Booher and Plaintiff "were not specifically paid for attending, or for their time traveling back and forth" (Defendants' Application for Leave to Appeal, p. 3), is inaccurate and misleading.

and OBD-II (the upgraded version for newer, more sophisticated vehicle models, analogous to newer generations of the Windows computer operating systems) (Tr I 36, 44, 68; Tr II 23, 106). Plaintiff had utilized the hand-held "Snap On" scanning computer, which plugs into the vehicle's OBD system to pull diagnostic "codes" (Tr I 18-19), both for previous employers and in his work for Defendant AUTO LAB (Tr I 20-21, 44).

In this regard, both of Defendant's principals, Hammock and Gable, conceded that accessing the diagnostic codes was entirely permissible within Plaintiff's certifications (Tr I 121; Tr II 24-27, 67, 106). Attending the seminar would refresh and increase Plaintiff's understanding of the system and its codes, leading to a reduction in mistakes and vehicle "comebacks," directly benefitting the company both financially and in terms of reputation (Tr I 13; 25-26, 36). As Plaintiff explained, the increased efficiency and accuracy that would result from his increased knowledge of the OBD-II system would produce greater net receipts on the "book rates" for his actual hourly work, resulting in more profit for the company (Tr I 26-28, 44, 68-69, 72). Hammock and Gable both acknowledged, albeit reluctantly, that in improving his skills on OBD-II Plaintiff would benefit AUTO LAB, even while operating within his non-diagnostic certifications (Tr I 121; Tr II 83, 94-96, 106).

Plaintiff, however, did not make it to the seminar. With Brian Booher driving, the two employees had left Coldwater around 4:00 p.m. in a light rain and were nearing the Grand Rapids destination at approximately 5:30 p.m. (the police report, reflecting a time of 5:57 p.m., was written well after the accident occurred) (B 15, 26; Tr I 28, 38). By that time the steady showers had increased to a driving rain storm with high winds, which caused

Booher's vehicle to hydroplane off the roadway and into a highway sign, causing severe injuries to Plaintiff JAMES (Tr I 29; B 26-27, 33).

Plaintiff filed his application for mediation or hearing on April 2, 2002. On September 10, 2002, Intervening Plaintiff AUTO-OWNERS, which had paid no-fault insurance benefits for Plaintiff's injuries, filed its own application for a declaration of its right to reimbursement of all the benefits it paid for which the workers' compensation carrier is primarily liable. The magistrate heard testimony and received the parties' briefs over the course of several hearings.

In a decision mailed December 8, 2003, Magistrate Block found Plaintiff's injuries to have arisen out of and in the course of his employment with Defendant AUTO LAB, thus awarding benefits for permanent and total disability. Intervening Plaintiff AUTO-OWNERS likewise was held to be entitled to reimbursement. Addressing the claim for attorney fees, Magistrate Block endorsed Plaintiff's written arguments in support of a 30% attorney fee and rejected the notion that the no-fault insurer's participation in the case (as equitable subrogee) should alter Plaintiff's attorney fee claim in any way. It awarded Plaintiff an attorney fee in the amount of 30% of the benefits ordered to be paid by Defendant, including therein both wage loss and medical expense benefits.

Defendants AUTO LAB/FARMERS appealed to the Workers' Compensation Appellate Commission, challenging the basic determination of liability, and challenging the attorney fee award in terms of whether the wage loss benefits should have been included in the 30% attorney fee computation and whether the magistrate properly *applied* its statutory

authority to assess an attorney fee against the employer-defendant. Whether the statute allowed for an attorney fee award to be rendered was not challenged; rather, Defendants conceded to both the magistrate and the Appellate Commission that the statute provides for such relief. (Trial Brief of Defendants' Auto Lab Diagnostics and Farmers Insurance Exchange, 11/21/03, p. 3) (quoting MCL 418.315(1) as authorizing the magistrate to "'prorate attorney fees at the contingent fee paid by the employee,'" and acknowledging that "this fee may permit the result plaintiff seeks" -- i.e., a 30% attorney fee assessed against the defendant/employer); (Brief on Appeal [of Defendants Auto Lab and Farmers to WCAC], 3/8/04, p. 19) (same).

In an opinion and order issued August 20, 2004, the Workers' Compensation Appellate Commission affirmed, in large part, the hearing magistrate's decision. On the principal issue of whether the injuries Plaintiff suffered arose out of and in the course of his employment, the Appellate Commission disagreed with Defendants-Appellants' interpretation of *Camburn v Northwest School District*, 459 Mich 471; 592 NW2d 46 (1999), concluding that it did not silently overrule *Bush, supra*. As for the attorney fee issue, the Appellate Commission reversed the magistrate's award only insofar as Plaintiff's wage loss benefits would be considered as supporting the recovery of attorney fees. The case was remanded to the magistrate on the issue of whether the expenses paid by Intervening Plaintiff AUTO-OWNERS for attendant care services were reasonably and necessarily incurred such as to render the employer and its insurer liable for reimbursement.

Following their receipt of the Appellate Commission's decision, Defendants filed an application for leave to appeal to the Court of Appeals, in which the same issues as before were reiterated, but in which Defendants also now sought to raise a new issue challenging the basic statutory authority for attorney fees to be awarded. The Court of Appeals denied the application by order of February 22, 2005. Defendants have responded by filing essentially the same application for leave to appeal to this Court.

Intervening Plaintiff-Appellee now joins Plaintiff JAMES in opposing Defendants' request for further review, for the reasons that follow.

ARGUMENT

I. THE COURT SHOULD DENY THE APPLICATION FOR LEAVE TO APPEAL BECAUSE, CONTRARY TO DEFENDANTS-APPELLANTS' INTERPRETATION OF *CAMBURN*, THE WCAC PROPERLY WEIGHED THE FACT THAT AUTO LAB WOULD DIRECTLY BENEFIT FROM PLAINTIFF'S PARTICIPATION IN THE SEMINAR WITH OTHER FACTORS AND THUS AFFIRMED THE SUPPORTED FINDING THAT THE INJURY WAS AN INCIDENT OF PLAINTIFF'S EMPLOYMENT.

Standard of Review

On review before the Worker's Compensation Appellate Commission, the factual findings of the hearing magistrate must be upheld under MCL 418.861a(3) only if they are supported by competent, material and substantial evidence on the whole record. *Mudel v Great American & Pacific Tea Co*, 462 Mich 691, 732; 614 NW2d 607 (2000). By contrast, on further review in the appellate courts, the factual findings made or upheld by the

Appellate Commission are regarded as *conclusive* if there is *any* evidence supporting the findings. MCL 418.861a(14); *Mudel, supra.* Issues of law are reviewed *de novo. Mudel, supra, citing, DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000). The judicial tendency, however, "should be to deny leave to appeal from decisions of the WCAC or, if leave is granted, to affirm, in recognition of the WCAC's expertise in this extremely technical area of law." *Mudel*, 462 Mich at 732, *citing, Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992).

In this case, in addition to the factual findings that are now conclusive, an issue is presented with respect to Defendants' position that the magistrate and WCAC misapplied *Camburn v Northwest School District*, 459 Mich 471; 592 NW2d 46 (1999). *See, Abbey v Campbell, Wyant & Cannon Foundry (On Remand)*, 194 Mich App 341, 351; 486 NW2d 131 (1992).

In this regard, however, as will be shown, it is Defendants who misconstrue *Camburn*, not the hearing magistrate or the Appellate Commission. The issue of whether Plaintiff's injuries arose out of and in the course of employment, then, presents a mixed question of law and fact, *Koschay v Barnett Pontiac, Inc*, 386 Mich 223, 225; 191 NW2d 334 (1971), *Zarka v Burger King*, 206 Mich App 409, 411; 522 NW2d 650 (1994), under which the factual findings made below are now binding under §861a(14).

Discussion

In its analysis following the trial in this case, the hearing magistrate considered the two-part test appearing in *Camburn v Northwest School District, supra*, found one of the two

prongs clearly to have been met by the proofs at trial, and ultimately concluded that "'[a] sufficient nexus between the employment and the injury" existed "so that it may be said that the injury was a circumstance of the employment.'" (Mag. Opinion, p. 3, *quoting*, *Thomas v Staff Builders Healthcare*, 168 Mich App 127, 130; 424 NW2d 13 (1988), *lv den*, 430 Mich 886 (1988)). The Appellate Commission, in this regard, properly upheld the magistrate's decision because it was legally correct and fully supported by the factual record.

In their application to this Court, Defendants argue that the "two-part test" discussed in *Camburn* for seminar-travel cases erects two independent hurdles both of which must be satisfied in all instances for a claim to succeed. The *Camburn* opinion, however, cannot be so construed. Prior case law calls for a fact-intensive weighing of various employment relationship factors, *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444; 320 NW2d 858 (1982); *Stark v L E Myers Co*, 58 Mich App 439; 228 NW2d 411 (1975), and far from overruling these precedents, *Camburn* retains this fact-based analysis on the ultimate issue of whether Plaintiff's participation in the seminar had such a "connection with the employment" as to render the injury compensable as an incident of employment.

The passage in *Camburn* on which Defendants so heavily rely (block-quoted twice in Defendants-Appellants' Application for Leave to Appeal, pp. 7 and 9) refers to the two "prongs" from Professor Larson's treatise -- (1) was the employer directly benefitted by the employee's attendance; and (2) was attendance compulsory or at least definitely urged or expected as opposed to merely encouraged? -- and then states, "Even if defendant was directly benefitted by plaintiff's intent to attend the seminar, substantial evidence supports

the magistrate's conclusion that attendance was neither compulsory nor definitely urged or expected. Instead, it was merely encouraged, and, as such, was not an incident of employment." *Camburn*, 459 Mich at 478.

There are several reasons why this brief passage cannot be construed as overruling prior precedent and establishing a new bright-line, two element litmus test in cases such as these. All of them, and not merely those explicitly relied upon by the Appellate Commission, refute Defendants-Appellants' position and mitigate against this Court granting leave to appeal.

Preliminarily, the passage at issue in *Camburn* is dicta. The hearing magistrate in that case found as fact that the teacher-claimant had established neither a direct benefit to her employer nor that she was required, expected or urged to attend the seminar; and the Appellate Commission upheld these findings of fact -- there simply was no substantial connection between the employment and the injury. Not surprisingly, the Court of Appeals affirmed, as did the Supreme Court. 459 Mich at 476-477. Accordingly, whether clearly establishing *one* of the two prongs of the "two-part test" would have rendered the claim compensable was not an issue before the Court.

Indeed, not only is the subject passage on which Defendants rely dicta, but it is not even particularly persuasive dicta, since it contains no critical analysis whatsoever. (Note that this passage was not actually authored by the Supreme Court either, but is merely a passage within the Court of Appeals' *Camburn* opinion that was adopted wholesale by this Court's *per curiam* opinion.) Defendants' contention that this passage, in one sweeping

stroke of the pen, effectively overruled *Bush*, *supra*, is without merit. (*See*, Defendants' Application for Leave to Appeal, pp. 7-8.) [3]

More importantly, however, Defendants' interpretation of *Camburn* as creating a strict two-hurdle litmus test is contradicted by the broader discussion within *Camburn* itself. In its discussion and quotation of Professor Larson's treatise (as quoted within *Marcotte v Tamarack City Volunteer Fire Dep't*, 120 Mich App 671; 327 NW2d 325 (1982)), the *Camburn* opinion focuses on the "employment connection" as being the critical element, and *both* the degree to which the employer required or encouraged participation in the seminar *and* the extent to which the employer would benefit from such participation are to be weighed *together* to reach a *single* conclusion on whether the requisite "employment connection" is established:

> As to the attending of conventions, institutes, seminars, and trade expositions, compensability similarly turns on whether claimant's contract of employment contemplated attendance as an incident of his work. ...
>
> Employment connection may be supplied by varying degrees of employer encouragement or direction. The clearest case for coverage is that of a teacher who is directed to attend a teacher's institute. It is also sufficient if attendance, although not compulsory, is "definitely urged" or "expected," but not if it is merely "encouraged." **Connection with the employment may also be bolstered** by the showing of a specific employer benefit, as distinguished from a vague and general benefit, as

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[3] Defendants' assertion that the Appellate Commission disregarded *Camburn* altogether, or proceeded "as if *Camburn* had never been released at all" (Application for Leave to Appeal, pp. 7-8), is entirely without merit. The Appellate Commission's statement, following a lengthy excerpt from Intervening Plaintiff's analysis of *Camburn*, that "*Bush v Parmenter, Forsythe, Rude & Dethmers* [] remains a viable decision" (WCAC Opinion, p. 9) obviously means that *Bush* remains a viable decision *in light of Camburn* -- i.e., that *Camburn* did not overrule *Bush*.

> when an automobile mechanic at an examination given by the manufacturer permitted the dealer to advertise "factory-trained mechanic."

Camburn, 459 Mich at 477-478 (*quoting*, Larson treatise, as quoted in *Marcotte*, *supra*) (emphasis added).

The Supreme Court's approval of this passage -- under which a direct benefit experienced by the employer may "bolster" an otherwise deficient employment "connection" -- forecloses Defendant's interpretation of the so-called "two-part test" and instead requires that the two prongs of the test be weighed together.

Indeed, Defendants' interpretation (that meeting one prong but not the other will never suffice) is clearly untenable. Suppose an employer specifically insists and even *requires* that the employee participate in a particular seminar -- thus seemingly making the "employment connection" clear -- and yet no particular benefit to the employer is established by the evidence. Under Defendants' reading of *Camburn*'s "two-part test," an injury claim arising out of this employee's attendance at the seminar would fail because only one of the two prongs will have been met. The better reading of *Camburn* (and Larson, quoted therein) is that the "employment connection" would be clearly established so as to render the injury an incident of the claimant's employment.

The magistrate so construed *Camburn*, and the Appellate Commission, agreeing with the magistrate's reading, relied on one of its own precedents in which *Camburn* was applied in line with the approach of weighing and balancing the factors and not, as Defendants argue, as a strict two-element litmus test. In *Reiniche v Wal-Mart Stores, Inc*, 2001 ACO #64; 14

Mich Workers' Comp Law Rep ¶1305 (2001), an employee of the defendant participated in a Labor Day parade, in which the defendant had entered a "float" as a matter of civic pride. The employee was neither required nor even urged to participate, but was at most "merely encouraged" to do so, and she was not paid for her time. She claimed benefits for the injuries she sustained when she fell off of the float. The magistrate in that case construed *Camburn* as controlling and denied the claim.

The Appellate Commission reversed and held that the work-centered nature of the employee's activity -- particularly the extent to which the employer derived a direct benefit from the activity -- required a finding of compensability:

> We have no disagreement with the magistrate's determination that defendant employer only encouraged participation in a voluntary activity. Indeed, we fully accept the magistrate's understanding of the underlying facts in this case. [Footnote omitted.] However, as a legal matter, we believe the magistrate should not have centered his conclusion as heavily on the matter of the non-required nature of plaintiff's activity.[3] Most important, from our point of view, he should have gone further and given greater legal weight to the heavily work-centered nature of the activity in which plaintiff was engaged at the time she was injured.
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> - - - - - - - - - - - - - - - - -
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> [3] The magistrate analyzed a number of factors relevant to the disposition of the question of "arising out of and in the course of," but he placed particular emphasis on the voluntary nature of plaintiff's activity at the time of the injury.

Reiniche, *supra* (emphasis added).[4]

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[4] In light of the Appellate Commission's thoughtful observations in this regard, it is worth reemphasizing this Court's admonition that there should be a judicial tendency of deferring to "the WCAC's expertise in this extremely technical area of law." *Mudel*, 462 Mich at 732.

The Appellate Commission in *Reiniche*, in essence, found the magistrate's analysis in that case to be faulty on the very grounds Defendants urge in the case at bar: too much tunnel-visioned emphasis on the "voluntary" nature of the plaintiff's activity at the time of injury (attending the OBD-II seminar) without proper consideration of the heavily work-centered nature of the overall endeavor. Indeed, the dissenting opinion in *Reiniche*, far from disputing the majority's insistence that all the "unique facts" and "factual variables" need to be considered, took exception to the majority upsetting the magistrate's factual findings. The dissent specifically agreed that the inquiry is heavily fact-based and requires a weighing of all factors:

> I agree with the majority that this is not a "clear cut case" and is in fact "a very close call." However, cases which are "very close" call for appellate restraint in favor of the magistrate's findings[.]

Reiniche (Martell, C., dissenting).

In the case at bar, the hearing magistrate avoided the error found in *Reiniche* -- his opinion fully considered that Plaintiff's participation in the OBD-II seminar was "merely encouraged," but also fully considered all other aspects of the heavily work-centered nature of the endeavor.

As detailed herein (and in the workers' compensation opinions themselves), Plaintiff (along with his fellow technician, Brian Booher) was offered to attend the two-day, 8 hour seminar, at Defendant's expense. The reason Defendant had them attend, as opposed to saving the seminar "credits" for other technicians to use later, was that Defendant would receive a direct benefit from Plaintiff's increased understanding of OBD-II in the form of

increased profits and reduced "comebacks," directly benefitting the company's reputation (Mag. Opinion, pp. 3-4; WCAC Opinion, p. 2). Plaintiff was "on the clock" at the time of his injury (*id.*), and was facing a risk of injury substantially and undeniably increased beyond that of his usual commute-to-work risk in that the drive was two-hours long (and would have been two-more hours back afterwards) after a day of work and through a perilous rain storm (*id.*).

In sum, the magistrate properly analyzed this "arising out of and in the course of" issue with regard not only to the extent to which Plaintiff's participation in the seminar was voluntary but also as to all aspects of its importance to Defendant, as a uniquely factual inquiry, to properly conclude that a sufficient "employment connection" was established (*Camburn*, at 477-478) to entitle Plaintiff to compensation. The Appellate Commission properly upheld these findings of the hearing magistrate and affirmed the award of benefits. No compelling basis exists for the Court to grant further review.

II. LEAVE TO APPEAL SHOULD BE DENIED ON DEFENDANTS' ATTORNEY FEE QUESTIONS SINCE THEY ARE NOT PRESERVED OR WERE OTHERWISE DECIDED PROPERLY BELOW.

Standard of Review

Intervening Plaintiff-Appellee, AUTO-OWNERS, accepts Defendants' statements regarding the standard of review as accurate (Application for Leave to Appeal, p. 9), and incorporates by reference its own earlier statement of the standard of review (*supra*, pp. 8-9).

It is further observed, however, that issues not raised before the hearing magistrate and Appellate Commission are not preserved and should not be addressed by the courts in a further appeal. *Mudel*, 462 Mich 719-720. Moreover, an affirmative position taken by a party in the lower court cannot thereafter be attacked by that same party on appeal; the contrary position, rather, is deemed to have been waived. *Schulz v Northville Public Schools*, 247 Mich App 178, 181 n. 1; 635 NW2d 508 (2001); *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997); *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

Discussion

As its second issue raised by application to this Court, Defendants assert that their liability for attorney fees should be reviewed, claiming that the Appellate Commission "failed to consider or resolve issues duly raised before it in that regard" (Defendants' Application for Leave to Appeal, p. 9 -- argument heading). Yet the issues are not properly before this Court or, to the extent review has not been waived, substantial grounds for challenging the lower tribunals' decisions are not presented.

Defendants' principal claim is that MCL 418.315(1) does not allow for an award of attorney fees to be assessed against the defendant-employer. Case law is to the contrary. As Defendants acknowledge in their Application, the existing precedent is that the statutory language "may permit the assessment of an attorney fee against a defendant." (Defendants' Application for Leave to Appeal, p. 10). In their application, Defendants seek to challenge that existing case law.

Defendants are not in a position to do so, however, for two reasons. First, as Defendants frankly acknowledge, they never raised this issue at either the hearing level or in their appeal to the Workers' Compensation Appellate Commission (Application for Leave to Appeal, p. 13, n. 2).[5] The issue, therefore, has not been preserved and should not be reviewed. *Mudel*, at 719-720.

Defendants, however, did not merely remain silent on the issue of whether §315(1) authorizes an award of attorney fees. Defendants affirmatively represented to both lower tribunals that discretion *is* accorded the magistrate to award attorney fees against the employer, and only claimed that, in this case, a full award should not be given.

In its brief to the Appellate Commission, Defendants pointed to the text of §315(1) as not allowing attorney fees based on a claimant's award of wage loss benefits, but acknowledged that medical expense reimbursement, on the other hand, *does* form the basis for statutory recovery of attorney fees (Defendants' Brief on Appeal to the WCAC, 3/8/04, p. 19).[6] After quoting the statute ("... The worker's compensation magistrate may prorate attorney fees at the contingent fee paid by the employee"), Defendants argued that an

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[5] Citing the dissent in *Stankovic v Kasle Steel Corp*, 2000 ACO #124, Defendants attempt to skirt this procedural hurdle by suggesting that it would have been pointless to raise the issue earlier. Notably, however, the employer-defendant in *Stankovic did* raise the issue, which gave the Appellate Commissioners the opportunity to address it. ("I submit that defendant in this case is perfectly correct when it argues that ..." *Stankovic*, Leslie, C., dissenting, emphasis added). The instant case, therefore, is not the appropriate vehicle for addressing this issue.

[6] *Watkins v Chrysler Corp*, 167 Mich App 122; 421 NW2d 597 (1988); *Nezdropa v Wayne County*, 152 Mich App 451; 391 NW2d 440 (1986); *Duran v Sollitt Construction Co*, 135 Mich App 610; 354 NW2d 277 (1984); *Zeeland Community Hospital v Vander Wal*, 134 Mich App 815; 351 NW2d 853 (1984); *Boyce v Grand Rapids Asphalt Paving Co*, 117 Mich App 546; 324 NW2d 28 (1982).

attorney fee should not be awarded in this case, but affirmatively acknowledged that, under the statute, "this fee may permit the result plaintiff seeks" (i.e., an attorney fee award in the amount of 30% of the reimbursed medical expenses) (Defendants' Brief on Appeal to the WCAC, 3/8/04, p. 19). Notably, the identical assertions and acknowledgments also were made to the hearing magistrate by Defendants (Trial Brief of Defendants Auto Lab/Farmers, 11/21/03, p. 3).

Having affirmatively acknowledged to the lower tribunals that the statute in question, §315(1), does permit an award of attorney fees to be assessed against a defendant-employer based on medical expense reimbursement, Defendants cannot now take a contrary position in their appeal to the judicial courts. The issue not only has not been preserved, it has been waived. *Schulz v Northville Public Schools*, 247 Mich App at 181, n. 1; *Phinney v Perlmutter*, 222 Mich App at 544; *Dresselhouse v Chrysler Corp*, 177 Mich App at 477.

Defendants' remaining challenges to the award of attorney fees concern not the statutory entitlement to receive attorney fees, but whether, on the particular facts of this case, the magistrate should have been deemed, in essence, to have abused his discretion. Given the uniquely consistent application of the statute by the workers' compensation bureau, however, in compensating successful claimants with a 30% attorney fee award, and the magistrate's acceptance of the detailed grounds advanced in the brief submitted by Plaintiff-Appellee (*see*, Magistrate's Opinion, pp. 5-7; adopted by Appellate Commission at WCAC Opinion, pp. 4-6), the magistrate clearly acted within his statutory discretion in allowing attorney fees to be recovered based on the medical expenses ordered to be reimbursed.

Substantial grounds for granting review of the Appellate Commission's partial affirmance of the hearing magistrate's award of attorney fees in this matter have not been presented. Accordingly, leave to appeal should be denied.

RELIEF REQUESTED

For all the foregoing reasons, Intervening Plaintiff-Appellee, AUTO-OWNERS INSURANCE COMPANY, respectfully requests that this Honorable Court DENY the application for leave to appeal.

Respectfully submitted,

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By: _____

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